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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

DAVID R. BENSON and JANICE M. BENSON,
Petitioners,

v.

RAYMOND C. HIGHTOWER, et al.,
Respondents.

On Petition for A Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Is a federal agent immune from a private action for violation of constitutional rights where the agent knew all relevant facts, but erroneously believed that those facts constituted a crime?

2. The plaintiffs imported South African Krugerrand gold pieces into the United States and properly reported this receipt under the currency reporting requirements. Federal agents obtained a search warrant for seizure of the Krugerrands, searched plaintiffs' home, and arrested plaintiffs for smuggling merchandise. Are the federal agents entitled to summary judgment that they reasonably and in good faith believed that the Krugerrands were merchandise and

not currency, where the record reflects that other federal agents believed that gold pieces were currency, the search of the plaintiffs' home went far beyond the scope of the search warrant, and IRS agents were included in the search?

PARTIES TO PROCEEDING

The petitioners here, plaintiffs in the district court, are David R. Benson and Janice M. Benson.

The respondents here, defendants in the district court, are Raymond C. Hightower and Jane Doe Hightower, his wife; Laurence W. Roxby and Jane Doe Roxby, his wife; John R. Helmerson and Jane Doe Helmerson, his wife; John M. Carlson and Jane Doe Carlson, his wife; Walter J. Brehm and Jane Doe Brehm, his wife; James D. Beck and Jane Doe Beck, his wife; James H. Curran III and Jane Doe Curran, his wife; Russell D. Wrenn and Jane Doe Wrenn, his wife; Jon M. Hood and Jane Doe Hood, his wife; Paula M. Rasbank and John Doe Rasbank, her

husband; Steve E. Rowlette and Jane Doe Rowlette, his wife; and Gayle D. Kindred and Jane Doe Kindred, his wife.

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On Petition for A Writ Of Certiorari
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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 633 F.2d 1265 and is set forth in Appendix A. The appeal was taken on Order Granting in Part Defendant's Motion for Summary Judgment,

entered by the District Court on September 1, 1976. The order is part of the Clerk's Record, Volume I, page 118 (CR I-118), and is set forth in Appendix B.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provision involved is Amendment IV to the United States Constitution.

The statute involved is 18 U.S.C. § 545.

The administrative regulations involved are 31 C.F.R. §§ 103.11, 103.23(b), and 103.25(c).

These provisions are set forth in Appendix C.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on December 8, 1980. The Court of Appeals denied a timely petition for rehearing on

January 28, 1981. This petition for certiorari is filed within ninety days of that date. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Bensons Were Subjected To A Search, Arrest, And Criminal Charges For Actions Which Were Not Criminal.

Two foreign packages arrived at Sea-Tac Airport, Seattle, Washington on February 4, 1975. While conducting a Customs inspection for declarable items, Customs agents opened these packages. They discovered copper plaques from which they removed the backs. The plaques contained 44 South African Krugerrand coins. The agents removed all but two of the coins, replaced them with metal washers and inserted fluorescent powder in the plaques, releasing the packages for pickup on February 7, 1975.

On February 4, 1975, petitioners David and Janice Benson resided at 416 - 35th Avenue, Seattle -- the address on the packages the Customs agents had examined. The Bensons are ministers and spiritual counselors with The Aquarian Foundation, a world-wide spiritual religious organization. The house in which they lived was quite large and frequently the temporary home of many out-of-town visitors to The Foundation. When the Bensons received a card from Western Airlines announcing the arrival of the packages at the airport and addressed to another individual, it was not an unusual occurrence. Because of the number of people visiting the house, it was a "house policy" to keep or pick up mail sent to 416 - 35th Avenue without regard to the name of the addressee.

Mrs. Julie Seguin, a 73-year old

widow and member of the Bensons' church, drove Mr. Benson to the airport on February 7 to pick up the packages. For over twenty years she contributed to The Foundation by providing driving services when needed. When they arrived at the airport, Mr. Benson went to the air freight office to pick up the packages. He asked how much duty he owed, paid the amount quoted, and then received the packages.

Mr. Benson reported the Krugerrands to the Treasury Department on March 4, 1975. He reported receipt of the Krugerrands on Treasury Form 4790, Report Of International Transportation of Currency or Monetary Instruments, pursuant to 31 C.F.R. § 103.

Respondent Raymond C. Hightower, U.S. Customs agent, swore out an affidavit for a search warrant on the very

day that Mr. Benson picked up the packages containing the Krugerrands. Agent Hightower swore in his affidavit that the Krugerrands were evidence of violations of 18 U.S.C. § 545. The search warrant was issued and agent Hightower immediately collected eleven other federal agents and descended on the Benson home to search for the Krugerrands.

The Customs agents found the coins and documents referred to in the search warrant within the first fifteen minutes of their search. After seizing these items, the agents placed the Bensons under an ultraviolet light to discover whether the Bensons had fluorescent powder on their bodies. One-half hour to an hour after the search began, the plaintiffs were arrested and charged with smuggling Krugerrand coins in violation of 18 U.S.C. § 545 and § 542. Mr. Benson

alone was charged with entering Krugerrands into commerce by means of a false and fraudulent declaration, a violation of 18 U.S.C. § 542.

The search, however, continued for a total of three hours throughout the basement, first floor, second floor, and partially finished attic of the residence of 416 - 35th Avenue. All rooms were photographed and thoroughly examined. The agents seized various items, including a wig, papers, a revolver, tools, a triple beam balance, a small amount of marijuana and a bag of powdered milk. They also called the Internal Revenue Service and requested two of its agents to participate in the search of the Benson home. In the course of the three-hour search, the agents broke a framed glass art object and the door to one of the second floor bedrooms. When the search ended, the agents impounded the automobile

belonging to Mrs. Seguin, who was not present at the time of the search.

An indictment against the Bensons was filed on March 6, 1975. Mr. Benson was charged in Count I with violating 18 U.S.C. § 542 by filing a false Customs declaration. Mr. and Mrs. Benson were charged in Count II with smuggling merchandise, i.e., the 44 South African Krugerrand gold pieces in violation of 18 U.S.C. § 545.

The Bensons moved to dismiss the indictment on the ground that currency is not merchandise and failure to declare currency cannot be a crime under 18 U.S.C. § 545. The trial judge agreed with this argument and dismissed Count II of the indictment. The trial court ruled that Krugerrands were currency, that this was a question of law for the court to decide, and was not a question of fact. (Trans-

cript of Proceedings of May 15, 1975, p. 15) The Government subsequently voluntarily dismissed Count I of the indictment.

B. The Bensons Brought This Action Against Federal Agents For Violation Of Their Constitutional Rights.

Petitioners David and Janice Benson filed the complaint in this action on February 6, 1976 in the United States District Court for the Western District of Washington against the thirteen federal agents who participated in the search of the Benson residence. The complaint alleged four causes of action for violations of the Bensons' Fourth Amendment rights and alleged jurisdiction under 28 U.S.C. § 1331(a). The Bensons' four causes of action were:

1. The defendants conducted a search and arrested plaintiffs pursuant to a search warrant issued without probable cause and invalid on its face,

thereby violating the Fourth Amendment to the Constitution of the United States.

2. Even if the search warrant was valid, the search and seizure exceeded the scope of the warrant and constituted an unlawful general search conducted in an unreasonable manner, violating the Fourth Amendment to the Constitution of the United States.

3. The defendants falsely arrested plaintiffs for violations of 18 U.S.C. § 545 and falsely arrested David Benson for violation of 18 U.S.C § 542.

4. The defendants trespassed upon a portion of the searched premises in the exclusive possession of the Bensons.

C. The District Court Dismissed This Action On The Ground That The Federal Agents' Erroneous Belief That The Plaintiffs Had Committed A Crime Was A Good Faith Mistake Of Fact.

The federal agents moved for summary judgment on the ground that they were

officially immune from liability because they acted with probable cause and in good faith. The motion was based on the records and files in the criminal proceeding and on affidavits submitted by the federal agents. Each agent swore that he reasonably believed that a criminal offense had been committed.

The Bensons resisted the motion for summary judgment on the ground that there could be no probable cause because no crime had been committed. The Bensons pointed out that the defendants were all Customs agents and that the Treasury Department's own regulations provided that currency was not merchandise and need only be reported within thirty days of importation. The Bensons questioned the defendants' sworn statements that they reasonably believed that a crime had been committed.

The credibility of the defendants' affidavits is further weakened by an affidavit filed in the criminal action. The federal agents relied on all records in the criminal action in filing their motion, and those records are part of the record on appeal. The affidavit of Westin C. Bailey in the criminal action relates that Mr. Bailey inquired of three federal agents on March 10, 1975 whether gold coins minted by other countries were currency which should be declared on the Customs Form 4790 within thirty days of importation. All three agents told Mr. Bailey that indeed such currency could be declared on the Form 4790 if it was considered currency in the country from which it came. The defendants also questioned the credibility of the federal agents' protestations of good faith in light of the fact that twelve agents par-

ticipated in the search, the search exceeded the scope of the search warrant, and IRS agents were brought in to participate in the search.

The trial court granted the federal agents' motion for summary judgment as to the first, third and fourth causes of action set forth in the Bensons' complaint. The trial court held that the federal agents had established the defense of immunity because they acted pursuant to a search warrant and they acted in good faith. The trial court's order of summary judgment left only the Bensons' second cause of action, that the search and seizure exceeded the scope of the search warrant. The court later granted the Bensons' motion for voluntary dismissal of the second cause of action to prevent the financial hardship of litigating the issue of the overly broad search and later, after appeal, retrying the same

facts with the same witnesses on the first, third, and fourth causes of action.

D. The Court Of Appeals Affirmed On The Ground That A Good Faith Mistake Of Law Entitled The Federal Agents To The Qualified Immunity Defense.

The Court of Appeals held that there is no difference between a mistake of fact and a mistake of law for purposes of official immunity to an action of this nature. The Court held that the federal agents had amply established that they acted reasonably and in good faith.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court; That Is, Whether A Good Faith Mistake Of Law Is A Defense In A Civil Action For Violation Of Constitutional Rights.

This Court in a series of cases has defined the contours of the defense of official immunity to a private action for violation of constitutional rights. In Gomez v. Toledo, 446 U.S. 635 (1980), the

Court considered whether in an action brought under 42 U.S.C. § 1983 a plaintiff must allege that a public official has acted in bad faith in order to stake a claim for relief. In Procunier v. Navarette, 434 U.S. 555 (1978), the Court considered whether a state official was liable under 42 U.S.C. § 1983 for negligent interference with constitutional rights established by case law subsequent to the time of the challenged conduct. In Butz v. Economou, 438 U.S. 478 (1978), the Court considered whether federal officials in the executive branch have an absolute immunity from private causes of action for all discretionary acts within the scope of their authority. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the court considered whether the Eleventh Amendment absolutely bars civil damage actions brought under 42 U.S.C. § 1983 against state officials. In Pierson v. Ray, 386

U.S. 547 (1967), the Court considered whether a police officer could assert the defense of good faith and probable cause to an action under 42 U.S.C. § 1983 for unconstitutional arrest.

The Court of Appeals in this case further enlarged the immunity defense of federal officials by holding that a good faith mistake of law is an adequate defense to a private damage action for violation of constitutional rights. This Court has never considered that issue and should grant this petition for certiorari to address the issue. This Court held in Pierson v. Ray, supra, that a reasonable good faith mistake of fact is an adequate defense to an action of this nature. No mistake of fact is presented by this case; the only mistake is one of law, whether Krugerrands are currency or merchandise. This Court also decided in Pierson v. Ray that a police officer would be "excus[ed]

from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." 386 U.S. at 555. This principle does not control the instant case. The statute here was never held to be unconstitutional. It was clear on its face from the beginning and the federal agents simply misapplied the statute.

The Court of Appeals relied on the following dictum in Butz v. Economou, supra:

> Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. But we see no substantial basis for holding, as the United States would have us do, that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule.

438 U.S. at 507. This statement is dictum only. The Butz case did not even present the issue of mistake of law.

The Court's consideration of the immunity defense has always been guided by a "considered inquiry into the immunity historically accorded the relevant official at common law and the intentions behind it." Imbler v. Pachtman, 424 U.S. 409 (1976). The common law on this issue is best set forth in Restatement (Second) of Torts, § 121, Comment i, which provides:

> A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to the existence of facts which, under the rule stated in this Section, justify an arrest without a warrant. On the other hand, no protection is given to a peace officer who, however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance. Thus, an officer is not privileged to arrest another whom he reasonably suspects of

> having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony. So too, a peace officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistaken construction of a statute, believes to have been made a felony by such statute. And this is true although the reasonable character of the officer's mistake is proved by the fact that at the time of the arrest the statute is generally understood to make such an act a felony and is not judicially construed to the contrary until after the arrest is made.

(emphasis supplied)

Public policy supports the rule set forth in the Restatement. Officials charged with enforcing the law should know better than anyone else whether a fact pattern constitutes a crime under that law. Enforcement agents are trained for their jobs, and repeatedly encounter similar fact patterns. There is no excuse for a mistake of law on the part of a

federal agent which results in an extensive search of a private residence and the wrongful arrest and indictment of a private citizen. This is particularly true when the agency charged with enforcing the law has promulgated regulations clearly indicating that the private party's actions do not constitute a criminal offense.

It has always been a fundamental principle of our jurisprudence that ignorance of the law excuses no man. Certainly, the Bensons could not have defended against the criminal charges in this case on the ground that they were unaware of the requirements of federal law that they file a true and accurate Customs declaration. What possible reason justifies excusing the actions of government agents on the excuse that they too were ignorant of the law? It is

fundamentally unfair to impose criminal liability on a citizen ignorant of the law while granting immunity to a federal agent who is ignorant of the law.

A federal agent abuses his position when he acts in ignorance or disregard of the law. Congress' purpose in enacting 42 U.S.C. § 1983 was "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961). This Court expanded the protection of a private citizen against illegal conduct by federal agents by holding that such conduct gives rise to a cause of action for damages. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The Ninth Circuit Court of Appeals has cut back substantially on the right

of every individual to claim the protection of the laws, which this Court has called "the very essence of civil liberty." Marbury v. Madison, 1 Cranch 137, 163 (1803). This Court should grant this petition for certiorari and correct this dangerous erosion of individuals' constitutional rights.

B. The Court Of Appeals Has Decided The Question Presented In A Manner Which Conflicts With An Applicable Decision Of This Court.

This Court held in Adickes v. Kress & Co., 398 U.S. 144 (1969) that on a summary judgment motion, the defendant in an action under 42 U.S.C. § 1983 bears a heavy burden of proving the absence of a genuine issue as to any material fact. The Court pointed out in that case that the defendant had failed to foreclose any possibility that the police conspired with the defendant to cause plaintiff's arrest on a false charge of vagrancy.

In the instant case, the federal agents failed to foreclose the possibility that they were aware that the Bensons' actions were not criminal activities. Therefore, even assuming that the Court of Appeals correctly held that a good faith mistake of law is an adequate defense to an action of this nature, the district court improperly granted summary judgment on behalf of defendant federal agents.

The record in this case includes an affidavit which calls into question the federal agents' affidavits that they reasonably believed that the Bensons had committed a crime. The affidavit of Westin Bailey in the criminal proceedings against the Bensons clearly reflects the fact that within one month after the Bensons were arrested, Mr. Bailey was advised by three different federal agents that

gold coins used as currency in their country of origin were considered currency under the Customs laws and should be declared on a Customs Form 4790 filed with thirty days after importation of the coins. The Bensons complied with this very regulation. Mr. Bailey's affidavit sufficiently disputes the federal agents' affidavits to defeat summary judgment in this case.

The alleged reasonableness of the federal agents actions is also called into question by the fact that twelve agents were summoned to execute the warrant, the scope of the search far exceeded the search warrant, and IRS agents were involved in the search despite the fact that there was no evidence of any violation of Internal Revenue statutes. Summary judgment was inappropriate, this

Court should grant the petition for certiorari and reverse the decision of the Court of Appeals on this ground alone.

CONCLUSION

Petitioners respectfully submit that the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

EDWARDS & BARBIERI

By: Malcolm L. Edwards
Robert G. Sieh

Counsel for Petitioners

APPENDIX A

BENSON v. HIGHTOWER

David R. BENSON, et al.,
Plaintiffs-Appellants,

v.

Raymond C. HIGHTOWER, et al.,
Defendants-Appellants.

No. 78-3223.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 10, 1980

Decided Dec. 8, 1980

Plaintiffs brought constitutional tort damage action against several United States Customs agents for alleged violation of plaintiff's Fourth Amendment rights. The United States District Court for the Western District of Washington, Walter T. McGovern, J., granted agents' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Tashima, District Judge, sitting by designation, held that: (1) agents were protected by qualified immunity defense, and (2) even if agents' mistake was one of law, qualified immunity defense based on reasonable grounds was available.

Affirmed.

1. United States - 50

In order for qualified immunity defense to apply, there must have existed, at time and in light of all the circumstances, reasonable grounds that action was appropriate and officials must have acted in good faith.

2. Customs Duties - 54

United States Customs agents who executed search warrant for gold pieces which were later adjudged not to be declarable items were protected by qualified immunity defense against plaintiffs' constitutional tort damage action for alleged violation of Fourth Amendment rights. Since reasonable grounds existed for action taken based on suspicious circumstances and conduct of plaintiffs and agents acted in good faith based in imprimatur of neutral, independent judicial officer in issuing search warrant. 18 U.S.C.A. § 545; U.S.C.A. Const. Amend. 4.

3. Customs Duties - 54

Assuming the United States Customs agents and magistrate issuing search warrants were mistaken in concluding that gold pieces were declarable items and that such mistake was a mistake of law, such mistake did not vitiate agents' qualified immunity defense based on reasonable grounds.

Appeal from the United States District Court for the Western District of Washington.

Before TRASK and KENNEDY, Circuit Judges, and TASHIMA,* District Judge.

TASHIMA, District Judge.

This is a Bivens type[1] constitutional tort damage action against a number of U.S. Customs agents for alleged violation of plaintiffs' Fourth Amendment rights. A search warrant was issued by a United States Magistrate on the affidavit of one of the defendant-agents, declaring, in essence, that he had reasonable cause to believe that plaintiffs were smuggling South African Krugerrand gold pieces into the United States. The warrant was executed, Krugerrands were found and plaintiffs were arrested. In due course, an indictment was returned charging plaintiffs with smuggling Krugerrands into the United States in violation of the customs laws. 18 U.S.C. § 545. This charge was subsequently dismissed by the trial judge on the ground that Krugerrands were currency and, thus, not declarable items.[2] This action followed.

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*The Honorable A. Wallace Tashima, United States District Judge, Central District of California, sitting by designation.

[1]Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[2]Subsequent to his arrest, plaintiff David R. Benson reported the receipt of 44 Krugerrands under the currency reporting requirements. 31 U.S.C. § 1101; 31 C.F.R. § 103.25.

The district court granted defendants' motion for summary judgment on the ground that defendants had established as a matter of law on uncontroverted facts the qualified immunity defense. Plaintiffs have appealed from the judgment.

[1, 2] The requirements of that defense are well-established in this circuit. There must have existed, at the time and in light of all the circumstances, reasonable grounds that the action was appropriate and the officials must have acted in good faith. Shelton v. United States Customs Service, 565 F.2d 1140, 1141 (9th Cir. 1977). The record below amply supports the existence of both requirements, primarily the suspicious circumstances and conduct of plaintiffs[3] and the imprimatur of the neutral, independent judicial officer in issuing the search warrant. These facts are not controverted.

The only remaining ground urged by plaintiffs as requiring reversal is the contention that, as a matter of law, the qualified immunity defense based on reasonable grounds is not available where the law enforcement officials' mistake is

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[3]The gold coins were hidden in the masonite backing of two copper wall plaques. The packages containing the coins were addressed to a fictitious name and plaintiff David R. Benson first attempted to claim the packages under an assumed name. Benson also made a false declaration of the value of the plaques.

a mistake of law.[4]

Plaintiff's rely on Restatement (Second) of Torts § 121, Comment i, which provides:

> A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to the existence of facts which, under the rule stated in this Section, justify an arrest without a warrant. On the other hand, no protection is given to a peace officer who, however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance. Thus, an officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony. So too, a peace officer is not privileged to

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[4]For purposes of this case, we assume without deciding that the agents and the magistrate were mistaken in concluding that Krugerrands are declarable items and that such mistake was a mistake of law, rather than mistake of fact. Cf. Cambist Films v. Duggan, 475 F.2d 887, 889 (3rd Cir. 1973) (police officer's mistaken conclusion that a motion picture was "obscene" in violation of criminal statute treated as a mistake of fact).

> arrest another whom he reasonably suspects of having committed an act which the officer, through a mistaken construction of a statute, believes to have been made a felony by such statute. And this is true although the reasonable character of the officer's mistake is proved by the fact that at the time of the arrest the statute is generally understood to make such an act a felony and is not judicially construed to the contrary until after the arrest is made."[5]

We are not persuaded that the Restatement rule should be applied to bar the availability of the qualified immunity defense as a matter of law. Supreme Court dicta, analogous cases, and other

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[5]Plaintiff's argument that the qualified immunity defense is not available when a mistake of law is involved does not differentiate between liability for the search and the arrest. However, even under the Restatement formulation, the defense is not unavailable, i. e., the conduct is "privileged," with respect to the search which was pursuant to a "valid" warrant, as that term is defined in the Restatement. Restatement (Second) of Torts §§ 123, 210 & Comment h. But since the arrest here was made without a warrant, this appears to be the kind of fact circumstance to which this Comment was meant to apply.

authority support the rule that a good faith mistake of law should be treated no differently than a mistake of fact. Butz v. Economou, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978); Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967); See Midwest Growers Co-Op. Corp. v. Kirkemo, 533 F.2d 455, 464 (9th Cir. 1976); cf. United States v. Barker, 546 F.2d 940, 946-49 (D.C. Cir. 1976) (mistake of law defense available in criminal prosecution when "objectively reasonable under the circumstances" and "mistake of a government agent in relying on a magistrate's approval of a search can be considered virtually per se reasonable").

In Pierson v. Ray, supra, 386 U.S. at 555, 87 S.Ct. at 1218, the Supreme Court held public policy considerations to require that a police officer who arrests someone in good faith and with probable cause cannot be held liable for false arrest, even though the innocence of the suspect is later proven. The court then went beyond the Restatement in two respects: first, in its observation that, although not entirely free from doubt, "the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional"[6]; and, second, in holding that the qualified

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[6]The Court acknowledged that the Restatement took no position on this issue. Id. at 555 n. 10, 87 S.Ct. at 1218 n. 10.

immunity defense was available in the circumstances of that action under 42 U.S.C. § 1983. Id. at 557, 87 S.Ct. at 1219.

In Midwest Growers, supra, 533 F.2d at 464, we held that the qualified immunity defense applied to federal officials who procured the issuance of and executed a search warrant which was later held to be invalid because its issuance was not authorized by statute. Although the execution of a serach warrant "fair on its face" is immunized under Restatment (Second) of Torts §§ 124(a), 210, this protection is not expressly extended to one who procures the issuance of an invalid warrant. However, we applied the qualified immunity defense in spite of the officials' mistake of law because of their "reasonable belief that the warrant procedure was a valid exercise of the Commission's right of inspection." Id.

[3] In the case at bench, although the arrest was made without a warrant, the arrest followed immediately upon the conclusion of a successful search which was made pursuant to a warrant. Thus, a showing of probable cause had once been made to and endorsed by a magistrate. In these circumstances, the reasons for the application of the qualified immunity defense in Pierson, supra, argue as well for its application here. And our holding in Midwest Growers, supra, would seem equally applicable to this case.

We conclude that such policy reasons as can be marshaled in support of the Restatement rule are not convincing and

the application of the rule in these circumstances is unjustified. We, therefore, hold that a mistake of law of the kind involved here does not, *per se*, vitiate the qualified immunity defense.

The judgment is affirmed.

APPENDIX B

FILED IN THE
UNITED STATES DISTRICT
COURT [and entered]

Sept. 1 - 1976

EDGAR SCOFIELD, Clerk
By /s/, Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DAVID R. BENSON and JANICE M. BENSON, his wife, Plaintiffs, v. RAYMOND C. HIGHTOWER, et al., et ux., Defendants.	NO. C76-95M ORDER GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes on for consideration upon the defendant's Motion to Dismiss the above-entitled action pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, or in the alternative, pursuant to Rule 56, Federal Rules of Civil Procedure.

The Court having considered the records and files herein, including but not limited to the affidavits of defendants in support of the Motion, the affidavit of plaintiffs' counsel in opposition to the Motion, and the briefs and exhibits attached thereto which were submitted on the Motion, and the Court treating the defendants' Motion as a motion for summary judgment, pursuant to Rule 12(c), F.R. Civ. P., concludes that the Motion should be granted in part.

Defendants are agents of the United States Customs Service (together with their wives). The plaintiffs in this action were defendants in a criminal action entitled United States v. Benson, W.D. Wash. Cause No. CR75-71S. The factual background surrounding the criminal action as set forth in the defendants' Memorandum in Support of Motion to Dismiss is not in dispute and will not be repeated here. This case arises from plaintiffs' claim that defendants violated the Fourth Amendment rights of plaintiffs when, subsequent to a search warrant being issued by United States Magistrate John L. Weinberg, defendants entered the plaintiffs' residence while the plaintiffs were home, searched the home, seized certain items (including two gold South African Krugerrand coins), and arrested the plaintiffs.

Plaintiffs' Second Cause of Action alleges that the search conducted of plaintiffs' premises was overly broad, a so-called "general" search that was conducted in an unreasonable manner. Plaintiffs' counsel has submitted an affidavit which, when read in a light most favorable to the plaintiffs (as the nonmoving

party) is sufficient to controvert the defendants' claim that the search conducted was reasonable under the circumstances. The trier of fact must decide whether the search was conducted in an overbroad, overbearing, or unreasonable manner.

Plaintiffs' First, Third, and Fourth Causes of Action allege that defendants (1st) acted without probable cause when they conducted a search "pursuant to a search warrant issued without probable cause and invalid on its face"; (3rd) falsely arrested the plaintiffs for suspected violations of 18 U.S.C. § 545 and David Benson for violation of 18 U.S.C. § 542; and (4th) did trespass upon that portion of the premises in plaintiffs' exclusive possession.

While policemen (and Customs agents) have never been granted under common law an absolute or unqualified immunity from liability for acts undertaken within the outer scope of their employment, (Pierson v. Ray, 386 U.S. 547, 555 (1967)), said officers do have a valid and sufficient defense to such liability based upon a showing of good faith and probable cause. Scheuer v. Rhodes, 416 U.S. 232, 245 (1974); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1346--1348, (2nd Cir. 1972).

There is no allegation made in the Complaint that the defendants acted other than in good faith. Plaintiffs do allege in the Complaint that the defendants acted without probable cause in conducting the search and in subsequently arresting the plaintiffs for suspected

smuggling. Mere allegations are not sufficient under Rule 56, however, and the nonmoving party has the burden to respond by affidavit or other sworn testimony "set[ting] forth specific facts showing there is a genuine issue for trial." Rule 56(e), F.R. Civ. P. Nothing has been submitted by plaintiffs which raises as a material issue of fact the question whether defendants acted without probable cause when they conducted the search or made the arrests. On this basis alone, then, summary judgment of dismissal would be appropriate as to the First, Third, and Fourth Causes of Action.

Additionally, the Court finds there can be no factual dispute, that the defendants acted with probable cause in conducting the search. Defendant Hightower presented to Magistrate Weinberg an affidavit wherein facts within the personal knowledge of Mr. Hightower were alleged. Magistrate Weinberg, not Agent Hightower, then concluded that there was sufficient probable cause to issue the search warrant. It was upon this finding by the Magistrate of probable cause that the defendant agents acted in conducting their search. The statement in Agent Hightower's affidavit that "South African Krugerrand gold pieces are declarable items" was surplusage to his statement of facts which formed the basis of Magistrate Weinberg's conclusion. It was, at most, a mistake of fact, and when made in the scope of his duties will not subject an officer to liability absent a showing of bad faith. Pierson v. Ray, supra; Cambist Films Inc. v. Duggan, 475 F.2d 887, 889 (3rd Cir. 1973).

The arrests made of plaintiffs were based upon U.S. Magistrate's initial finding of sufficient probable cause to conduct a search for "evidence of violations of Title 18, United States Code, Section 545" (Search Warrant signed and dated February 7, 1975), and upon the finding of said evidence in plaintiffs' possession (see affidavits of defendants which state almost uniformly: "The arrests were made following discovery of two wall plaques, discovery of evidence that the plaques had been opened to remove the concealed coins, and discovery that Janice Benson had the same fluorescent powder on her hands and arms which had been placed inside the wall plaques"). The Court finds as a matter of law given the facts of this case and upon the U.S. Magistrate's initial finding of sufficient probable cause that a violation of 18 U.S.C. 545 had been shown, that the defendants had probable cause to arrest the plaintiffs for suspected violations of 18 U.S.C. 545. Thus, plaintiff's Third Cause should be dismissed.

Since the Court has found that probable cause existed to justify the search of plaintiffs' residence, the defendants had a right and a duty to be present on the premises. Plaintiffs' Fourth Cause of Action alleging wrongful trespass must fail as a matter of law.

Agent Jon M. Hood has submitted an uncontroverted affidavit that states he was not involved during the occasion of the search or arrests which constitute the subject matter of this litigation. The entire action thus should be dismissed with prejudice as to Agent Hood

pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Accordingly, defendants' Motion to Dismiss the action pursuant to Rule 56, Federal Rules of Civil Procedure, is GRANTED as to plaintiffs' First, Third, and Fourth Causes of Action and DENIED as to plaintiffs' Second Cause of Action. The Motion to Dismiss the action against the defendant Jon M. Hood is GRANTED with prejudice.

SO ORDERED.

DATED this /1st/ day of September 1976.

/s/
WALTER T. McGOVERN
Chief United States District Judge

APPENDIX C

Text of Constitutional Provisions, Statutes, and Regulations Involved

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Constitutional Provisions

United States Constitution, Amendment IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes

18 U.S.C. § 545

Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through

the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sales of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States," as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

Administrative Regulations

31 C.F.R. § 103.11

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

. . . .

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes U.S. silver certificates, U.S. notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

31 C.F.R. § 103.23

(b) Each person who receives in the U.S. currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under paragraph (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

31 C.F.R. § 103.25

(c) Reports required to be filed by § 103.23(b) shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.